NO. 49845-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTONIO JULIUS BRADLEY, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 16-1-02272-5

Brief of Respondent

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1. For the crime of felony harassment of a criminal justice participant is the State required to prove beyond a reasonable doubt that a defendant has the present and future ability to commit the threatened act where the relevant statute states that a defendant must have the present or future ability to commit the threatened act?

2. Was the evidence sufficient for a reasonable trier of fact to find beyond a reasonable doubt that defendant committed the crime of felony harassment of a criminal justice participant where the unchallenged findings of fact and the evidence showed that defendant had the future ability to commit the threatened act?

3. If this Court finds there is insufficient evidence to support a conviction for felony harassment of a criminal justice participant, is the proper remedy to remand for reinstatement of the vacated count, whose elements defendant does not challenge?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Antonio Julius Bradley, hereinafter "defendant," was charged by Information with Felony Harassment by Threatening to Kill and Felony Harassment of a Criminal Justice Participant. CP 3-4[1]. Defendant waived his right to a jury trial. CP 8. Because the trial was a bench trial the parties agreed that the CrR 3.5 hearing would occur contemporaneously with the trial. 12/20/16RP 7-8[2]. The same facts from the same incident were used for both the 3.5 hearing and the trial. The State called one witness to testify and defendant testified on his own behalf. 12/20/16RP 23, 87. Statements defendant made to the officer were admitted pursuant to CrR 3.5. CP 38-43, 12/20/RP 108-110.

Following trial, defendant was found guilty as charged. CP 31-37; 12/20/16RP 145. At sentencing the State moved to vacate Count I, the Felony Harassment by Threatening to Kill charge to avoid a double jeopardy issue. CP 11; 12/23/16RP 5. The court granted the State's motion. CP 12; 12/23/16RP 6. Defendant was subsequently sentenced to a

[1] The Information also listed defendant's various aliases, Anthony DeMarco Bradley, Bonds Santorio Lorenzo, and Antonio Bradley.

[2] The verbatim reports of proceedings are contained in two volumes. They are referred to by the date of the proceeding.

period of confinement of 51 months. 12/23/16RP 35l; CP 13-27[3]. He timely appealed. CP 44.

2. FACTS

On June 3, 2016, Fife Police Officer Bryan Pitman was on duty as a criminal justice participant and was on routine patrol. CP 31-37 (FoF 2)[4]. At approximately 5:50 A.M. Officer Pitman saw a car rapidly exit a driveway with large plumes of smoke several feet high coming out of the rear of the vehicle, blocking the visibility for other drivers on the street. CP 31-37 (FoF 3). The officer stopped the car for a defective exhaust. CP 31-37 (FoF 4). Officer Pitman went to contact the driver of the vehicle, later identified as defendant. CP 31-37 (FoF 5). When asked to produce his license, defendant admitted he did not have a license and that he might have warrants out for his arrest. CP 31-37 (FoF 6). Officer Pitman subsequently conducted a records check and determined defendant had a no bail felony warrant for Vehicular Assault and that defendant's driving status was suspended in the third degree. CP 31-37 (FoF 7). Defendant was subsequently arrest. CP 31-37 (FoF 8).

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[3] The judgment and sentence has a clerical error where the 51 months is listed as being imposed on the vacated Count I. CP 13-27. The remainder of the judgment and sentence correctly lists defendant as being sentenced as to Count II only. *Id.* Defendant also lists this as a clerical error and does not assign error. *See* Brf. of App. at 4 fn. 1.

[4] All factual information is based on the unchallenged Findings of Fact from the Bench Trial. "FoF #" refers to the specific Finding of Fact number and "CoL #" refers to the specific Conclusion of Law number.

Upon being arrested, defendant began to cry and beg for the officer to release him. CP 31-37 (FoF 9). Defendant told Officer Pitman about a recent family tragedy, but Officer Pitman explained he was still under arrest for the outstanding warrant. *Id.* Defendant was advised of his *Miranda*[5] warnings, he indicated he understood his rights, and that he would continue to talk to the officer. *Id.* At that point, defendant's demeanor began to change. CP 31-37 (FoF 10). He began to bang his head and feet on the inside of Officer Pitman's patrol car. *Id.* He then began to swear at the officer and call him names. *Id.*

While in the officer's patrol car, defendant began to knowingly make threats to Officer Pitman, while the officer was in his official role as a criminal justice participant. CP 31-37 (FoF 11). At the arrest scene, defendant stated, "Man, if I see you again, you are going to get it" and "You should be glad I don't have my burner on me." *Id.* Officer Pitman knew from his training and experience that a "burner" is a small concealable pistol. *Id.* The officer ignored these comments and did not engage defendant in any conversation. *Id.*

Officer Pitman began transporting defendant to the Fife Jail. CP 31-37 (FoF 12). On the way to the jail defendant stated, "Man, if these

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[5] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

handcuffs weren't on, I would show you, I'll spit on you, I'll knock you out," and "I'll get you." CP 31-37 (FoF 12). The officer again did not engage defendant. *Id.*

Upon arriving at the Fife Jail, Officer Pitman consulted with his supervisors and decided to transport defendant to the Pierce County Jail. CP 31-37 (FoF 13). Their rationale was due to defendant's threats and the additional security available at the Pierce County Jail. *Id.* On the way to the jail, defendant continued to knowingly make threats to Officer Pitman while the officer was a criminal justice participant. Defendant stated, "The next time I see you, it's lights out for you," "You are lucky I put my .32 in the trunk of my car before you stopped me, otherwise I would have shot you when you walked up to the car," and "Even then, you probably would have missed the .32 in my pants if I had it, and I would shoot you through this window right here faggot," "I should have just knocked you out when you walked up to the car, or drove away fast, you wouldn't have caught me." CP 31-37 (FoF 14). Defendant shifted his weight to the center of the rear seat during the drive. CP 31-37 (FoF 15). He looked at Officer Pitman and said, "The next time you see this face, it's going to be your life or mine," "This isn't a threat, it's a promise, and I make good on my promises," and "I won't hesitate, the next time I see you I'm going to kill you, even if you're walking with your daughter or child, I'll kill them too,

you'll see, I don't even care." Officer Pitman again did not engage defendant. CP 31-37 (FoF 14). He did not treat defendant poorly when these statements were made. *Id.* He was actually caught off-guard by defendant's statements. *Id.*

Shortly thereafter, defendant began repeating Officer Pitman's name, knowingly stating, "Pitman, Fife PD, you wait and see as soon as I get out, 48-61 months, mark the date, I'm coming for you." CP 31-37 (FoF 16). Defendant discussed being a gang member and has many associates in gangs. *Id.* He told Officer Pitman, "I know people, I'll call my friends as soon as I get a hold of a phone in the jail, and get them to find you today and kill you my nigger," "you just wait, I'll come back and start tagging stop signs and shit in Fife and Milton, you know, on the hill, and when you see those tags, I'm going to come for you, you'll be looking over your shoulder," and "I know I should have just done what I thought in the past, just kill any cop I see." *Id.* He continued by stating that he would call his friends and try to plan an attack against law enforcement in Fife and Milton, although defendant did not say when this would occur. *Id.* Upon arriving at the Pierce County Jail, defendant made one last threat to Officer Pitman, stating, "You just wait, I'll find you and your family, lights out, the hollows will follow." *Id.*

Officer Pitman had a reasonable fear of defendant. CP 31-37 (FoF 19). He was afraid for his life, the lives of his family, and the lives of his fellow officers based upon defendant's threats. CP 31-37 (FoF 19). The fear arose from the manner defendant described the means and times of attack and defendant's complete disregard for the lives of his family. *Id.* Officer Pitman notified his family members of the defendant's threats as a safety precaution. *Id.* His concern was so great that he and his family took extra precautions, including firearms training, additional security hardening of his home, and hypervigilance, even when doing mundane errands. CP 55-59; 12/23/16RP 16-17.

C. ARGUMENT.

1. THE ELEMENTS OF FELONY HARASSMENT REQUIRE THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT HAD THE PRESENT *OR* FUTURE ABILITY TO COMMIT THE THREATENED ACT. THE STATE PROVED SUCH BEYOND A REASONABLE DOUBT.

The parties are in agreement that defendant did not have the present ability to carry out the threat. *See* Brf. of App. at 13. Defendant does not assert that Officer Pitman was not a criminal justice participant. Nor does defendant assert that he did not knowingly threaten to kill Officer Pitman or cause him bodily injury immediately or in the future. The State agrees that Officer Pitman was a criminal justice participant and

defendant knowingly threatened to kill Officer Pitman or cause him bodily harm in the future. Rather the sole area of argument between the parties is whether RCW 9A.46.020 is conjunctive, meaning the State must prove there was both a present *and* future ability to carry out the threat, or whether it is disjunctive, where the State must prove defendant had the present *or* future ability to carry out the threat. *See* Brf. of App. at 7.

a. RCW 9A.46.020 is a disjunctive statute which only requires the State to prove that defendant had the present or future ability to commit the threatened act.

RCW 9A.46.020 states, in relevant part, that a person is guilty of felony harassment if:

> (a) Without lawful authority the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or any other person;

RCW 9A.46.020(1)(a)(i). If the person harasses a criminal justice participant who is performing their official duties at the time the threat is made, the harassment enhances from a gross misdemeanor to a class C felony. RCW 9.94A.020(2)(b)(iii). Threatening to kill the person threatened also enhances the harassment to a class C felony. RCW 9.94A.020(2)(b)(ii).

The court in ***State v. Boyle***, 183 Wn. App. 1, 335 P.3d 954 (2014), explicitly ruled on the issue of whether a defendant must have the present

and future ability to committed the threatened words against a criminal justice participant, or if a defendant must have either the present *or* future ability to commit the threatened acts against the criminal justice participant. The facts in ***Boyle*** are nearly identical to the facts present here. There, defendant was placed in wrist restraints in the backseat of a patrol car. ***State v. Boyle***, 183 Wn. App. at 5. After being given his *Miranda* warnings, Boyle made a series of threatening statements to the arresting officer. *Id.* Similar to here, Boyle argued that because he was in wrist restraints, he did not have the present ability to carry out the threat. *Id.* at 10. The court disagreed with his argument holding that (1) it would lead to absurd results as threats made electronically, to a third person, or threats exclusively of a future nature could not be prosecuted; and (2) if it is apparent to the criminal justice participant that the defendant has the present ability or future ability to carry out the threat, such constitutes harassment. *Id.* at 11. The court disagreed with his argument. The court's rationale on Boyle's desired outcome leading to absurd results is that threats made electronically, to a third person, or threats of exclusively future harm could not be prosecuted as a threat being made to a criminal justice participant. *Id.* Rather, the statute explicitly allows for threat made via electronic communication and/or in the future to be prosecuted. RCW 9A.46.020(1)(b).

A statute is ambiguous if it can reasonably be interpreted in two or more ways. ***Payseno v. Kitsap County***, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). However, a statute is not ambiguous if different interpretations are conceivable. *Id.* If the statute can still be interpreted in two or more ways after a plain meaning review, then the statute is ambiguous and a court must rely on statutory construction, legislative history, and relevant case law to determine legislative intent. ***State v. Rice***, 180 Wn. App. 308, 313, 320 P.3d 723 (2014). When the plain language of the statute is unambiguous, the legislative intent is apparent and a court will not construe the statute otherwise. ***State v. J.P.***, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory construction is a question of law reviewed *de novo*. ***State v. Soto***, 177 Wn. App. 706, 713, 309 P.3d 596 (2013).

When a court interprets a statute, it is a well-established rule that absurd results are to be avoided. ***State v. Burke***, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). If the legislation as written would create an absurd result, the Washington Supreme Court has created a narrow exception to allow courts to fix deficient legislation. ***State v. Albright***, 144 Wn. App. 566, 568, 183 P.3d 1094 (2008). One exception is that the legislature's error renders the plain reading of the statute absurd or undermines its purpose. ***State v. Taylor***, 97 Wn.2d 724, 730, 649 P.2d 633 (1982). A court may modify the statute only in cases in this situation and only if doing so is

required to make the statute rational. *Id.* at 729 (quoting ***McKay v. Dep't of Labor & Indus.***, 180 Wn. 191, 194, 39 P.2d 997 (1934)).

RCW 9A.46.020(2)(b) states, in relevant part:

> For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. *Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.*

RCW 9A.46.020(2)(b) (emphasis added). This is an exception, not an element of the charged offense. *See* ***State v. Boyle***, 183 Wn. App. at 11.

Reading RCW 9A.46.020(1)(b) as only requiring the criminal justice participant to reasonably believe that the threats will occur either in the present or in the future is consistent with the statutory definition of harassment. *Id.* Viewing this clause as an exception is consistent with the statutory structure. The elements for and means of committing harassment are listed in RCW 9A.46.020(1). Harassment in the statute is defined as threatening to cause bodily injury "immediately or in the future." RCW 9A.46.020(1); ***State v. Boyle***, 183 Wn. App. at 11. Acts that then enhance harassment from a gross misdemeanor to a class C felony are listed in RCW 9A.46.020(2)(b)(i)-(iv). The challenged language to the statute is the concluding sentence for subsection (2). It is placed distinctly and separately from the elements of the offense. When reading the challenged

language in the context of the whole statute it is clear the legislature intended this as an exception to the crime of felony harassment, not as an element.

b. The State introduced sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant had the future ability to carry out the threat.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (citing ***State v. Partin***, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of

logical probability." ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Circumstantial evidence and direct evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. ***State v. Carver***, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

When reviewing a trial court's findings of fact and conclusions of law, the court determines whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. ***State v. Hovig***, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Unchallenged findings of fact are verities of appeal. *Id.* Findings of fact

erroneously labeled as conclusions of law are reviewed as findings of fact. ***Willener v. Sweeting***, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Likewise, conclusions of law erroneously labeled as findings of fact are reviewed as conclusions of law. ***State v. Gaines*** 122 Wn.2d 502, 508, 859 P.2d 36 (1993). Conclusions of law are reviewed *de novo*. ***State v. Homan***, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

Similar to here, in ***Boyle***, defendant argued that because he was in wrist restraints, he did not have the present ability to carry out the threat. ***State v. Boyle***, 183 Wn. App. at 10. As previously discussed, the court explicitly rejected that argument as such would lead to absurd results and is not a required element. *Id.* at 11.

Here, defendant was handcuffed in the backseat of a patrol car. CP 31-37 (FoF 8). He was given his *Miranda* warnings. CP 31-37 (FoF 9). Defendant subsequently made a series of threatening statements to Officer Pitman that placed him in reasonable fear. CP 31-37 (FoF 11-17, 20). This is nearly identical to ***Boyle***.

It is unchallenged that when the threats were made defendant threatened to kill Officer Pitman, the officer had a reasonable fear that defendant could carry out the threats, and defendant had the future ability to carry out the threats. CP 31-37 (FoF 19-20). These are verities on appeal. ***State v. Hovig***, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Thus,

because a rational trier of fact could find that all of the elements of felony harassment against a criminal justice participant are met, this Court should affirm defendant's conviction.

2. IF THIS COURT FINDS THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT, THE PROPER REMEDY IS TO REMAND WITH INSTRUCTIONS FOR THE SENTENCING COURT TO REINSTATE COUNT I.

Defendant was convicted of two counts of felony harassment based on the same criminal conduct. CP 31-37. At sentencing, on the State's motion, Count I was vacated to avoid a double jeopardy violation. CP 11-12; 12/23/16RP 5-6. Defendant was only sentenced on Count II and other than a scrivener's error, there was no reference in the judgment and sentence as to Count I. CP 13-27[6].

The double jeopardy clause of the United States Constitution and the Washington State Constitution prohibit the imposition of multiple punishments for the same criminal conduct. ***State v. Turner***, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Washington's double jeopardy clause coexists with the federal double jeopardy clause and is interpreted the

[6] As previously mentioned, the judgment and sentence has a clerical error where the 51 months are listed as being imposed on the vacated Count I. CP 13-27. Nowhere else is Count I mentioned, listed or referenced. *Id.* The only crime listed throughout the remainder of the judgment and sentence pertains solely to Count II. *Id.* Defendant also lists such as a clerical error in his opening brief. *See* Brf. of App. at 4 fn. 1.

same way as the Supreme Court interprets the Fifth Amendment. *Id.* When a defendant is found guilty of multiple counts for the same conduct, the trial court does not violate double jeopardy protections if it enters a judgment and sentence referring only to the greater charge. *Id.* at 462. A judgment should be entered only on the greater offense and the defendant should be sentenced on that charge without reference to the verdict on the lesser offense. *Id.* at 463.

It is well-settled law that a defendant waives double jeopardy protections by challenging a conviction. ***State v. Walters***, 146 Wn. App. 138, 147, 188 P.3d 540 (2008). A lesser conviction previously vacated on double jeopardy grounds can be reinstated following an appellate court's reversal of defendant's more serious charge based on the same criminal conduct. ***State v. Turner***, 169 Wn.2d at 465 fn. 11. If defendant objects to retrial, the State must demonstrate a manifest necessity to retry defendant. ***State v. Walters***, 146 Wn. App. at 148-149. The determination of whether there is manifest necessity is based on the defendant's individual interests and constitutional protections being balanced with society's interest in recharging the defendant with another offense to ensure the ends of justice are met. *Id.* A defendant's right to be free from continuing jeopardy imposed by the government weighs heavily in his or her favor. *Id.* However, there must be consideration of whether a corresponding

injustice would result to the other party if the erroneous decision is set aside. ***State v. Schwab***, 163 Wn.2d 664, 676, 185 P.3d 1151 (2008). When a defendant would receive a "substantial windfall" from not being retried following the reversal of a greater offense, courts have generally allowed an alternative conviction for the lesser offense to be entered. *See* ***State v. Ward***, 125 Wn. App. 138, 146, 104 P.3d 61 (2005) (allowing alternative conviction for manslaughter to be applied after reversal of felony murder conviction, based in part on the fact that otherwise defendant would enjoy a substantial windfall). This is because defendant is simply returned to the position he would have been in if no error had occurred. *Id.* at 146-147.

Alternative means crimes are ones that provide that the proscribed criminal conduct can be proved in a variety of ways. ***State v. Smith***, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). When the defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether sufficient evidence supports each alternative means. ***State v. Sweany***, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). If one or more alternative means is not supported by sufficient evidence, there must be a "particularized expression" as to the supported means. ***State v. Woodlyn***, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

This case is the functional equivalent to an alternate means case. Here, defendant was convicted of two counts of felony harassment based

on the same criminal conduct. CP 31-37. Count I is the same crime, Felony Harassment, as Count II, albeit with different aggravating factors that raise each count to a felony. Count I was based on RCW 9A.46.020(2)(b)(ii), threatening to kill the person threatened, while Count II was based on RCW 9A.46.020(2)(b)(iii), threatening a criminal justice participant who is performing his official duties when the threat is made. CP 3-4. Defendant being convicted on both counts was a "particularized expression" by the court that there is sufficient evidence to support a conviction on both counts. At sentencing, on the State's motion, Count I was vacated to avoid a double jeopardy violation. CP 11-12; 12/23/16RP 5-6. Although both counts are both class C felonies with the same standard range sentence and seriousness level, it is a reasonable inference that the State found Count II to be the greater offense as it was directed at a criminal justice participant while he was performing his official duties versus just a general threat to kill. Defendant was only sentenced on Count II and other than a scrivener's error, there was no reference in the judgment and sentence as to Count I. CP 13-27.

Defendant has now appealed and has waived his double jeopardy protection. *See* ***Walters***, *supra*. If this Court were to reverse defendant's conviction on Count II, the proper remedy would be to remand to the sentencing court to reinstate Count I and sentence defendant accordingly.

Defendant does not challenge the sufficiency of the evidence regarding his actual actions. Rather, his sole challenge is to an exception listed specifically pertaining to RCW 9A.46.020(2)(b)(iii). *See* Brf. of App. at 7, 13. The evidence would still be sufficient to support defendant's conviction as to Count I, even if this Court reverses his conviction on Count II.

If Count II is not reinstated, an injustice would result for both Officer Pitman and society. The individual who threatened to kill Officer Pitman and his family would be free without any consequences for his actions. Such would give defendant a substantial windfall by going completely unpunished for the crimes of which he was convicted. The outcome of a trial determined by a rational trier of fact beyond a reasonable doubt should not depend upon fortuity of the count selected for vacation for double jeopardy purposes. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the [defendant]." ***Bozza v. United States***, 330 U.S. 160, 166-167, 67 S. Ct. 645, 91 L. Ed. 818 (1947). Reinstating defendant's conviction on Count I would achieve society's interests in ensuring the ends of justice are met. As such, if this Court reverses defendant's conviction on Count II, it should remand to the sentencing court to reinstate Count I and resentence defendant accordingly.

D. CONCLUSION.

For the aforementioned reasons, this Court should affirm defendant's conviction as the defendant only needed the present or future ability to commit the threatened act and the evidence was sufficient for a rational finder of fact to find beyond a reasonable doubt that defendant committed the crime as charged. In the alternative, this Court should remand for the sentencing court to reinstate defendant's conviction on Count I.

DATED: September 22, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-22-17 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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